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April 23, 1989

Carol Rothgeb
Contracting Officer
U.S. Department of Justice
Procurement Service
Procurement Services Staff
601 D Street, N.W., Room 7100
Washington, D.C. 20530

CL|INICO-01

Re: Protest of INSLAW Under RFP No. JPLDN-90-R-0020

Dear Ms. Rothgeb

INSLAW, Inc. hereby protests the award of any contract under the above-captioned RFP for the development of a comprehensive case management system for the Land and Natural Resources Division of the Department of Justice. The grounds of this protest are that the RFP unreasonably excludes off-the-shelf, commercial packages from consideration. In addition, the RFP is blatantly wired so as to virtually guarantee the selection of Software Development and Services Company (SDSC), which is run by William Garbee, a former INSLAW software executive. The RFP also contains misleading and erroneous information regarding the Department of Justice's ownership of software. The RFP is fatally flawed because of improper procurement planning. Finally, the RFP violates a court injunction which prohibits the conversion of PROMIS to other platforms. This RFP is a conversion contract masquerading as a development effort.

INSLAW requests the Department of Justice to cancel this RFP, and prepare a new solicitation which would permit INSLAW to propose its off-the-shelf software. In addition, the RFP should be structured so as not to violate the bankruptcy court injunction which prohibits precisely the activity that the Department is now undertaking.

The current procurement is an outgrowth of a continuing bias against INSLAW which has been fueled by a lack of regard for INSLAW's legitimate proprietary rights in case management software now installed at the Department of Justice. INSLAW is concerned that versions of this software are proliferating throughout the Justice Department with little or no management controls. These practices cannot go unchallenged. We request the Department of Justice to limit the damage to INSLAW by identifying the systems involved and putting controls on the dissemination of PROMIS-based software so that continued proliferation will not occur.

I. STATEMENT OF FACTS

On January 30, 1990, the Department of Justice issued a request for proposals to develop a comprehensive case management system for the Land and Natural Resources Division of the Department of Justice. As extended by Amendment 4, the due date for proposals is April 24, 1990. The purpose of the procurement is to obtain

> ...the services of an outside contractor to develop a comprehensive case management system for the Land and Natural Resources Division (Lands). For purposes of this project, case management refers to case tracking,

> attorney and paralegal timekeeping, debt and expert witness tracking, files management, FOIA/Privacy Act tracking, and case planning. The proposed systems will replace several automated and manual systems currently in use in the Division...."
>
> RFP at C-2.

The RFP further requires completion of all system development and implementation within one year of the date of contract award. Id. at B-1. Although the RFP does not contain detailed design specifications for the desired software, it did contain a number of functional and design requirements. As explained in more detail below, these requirements precisely match the capabilities of PROMIS, a proprietary case management product developed by INSLAW and installed at the Land and Natural Resources Division. Indeed, the RFP states on page C-13, that the Land Docket Tracking System, which is implemented in PROMIS, is "the principal case management system in the Division..." And page C-56 of the RFP stipulates that the new system developed in this procurement "...must provide the same functionality as the existing systems, as well as the items enumerated above, and more."

The version of PROMIS which is now installed at the Lands Division is a hierarchical data base. However, INSLAW recently completed development and testing of a new version of PROMIS which operates under the IBM relational data base management system, DB2. We will refer to this version of PROMIS as PROMIS/DB2. INSLAW is currently shipping PROMIS/DB2 to commercial customers.

DB2 is one of the two data base environments which the Department of Justice specifies for the RFP's case management development. The DOJ RFP contemplates that development of the case management system will occur in conjunction with a fourth generation relational data base management system. The RFP notes that the Justice Department Data Center will be purchasing DB2 or ORACLE in the near future, and encourages vendors to use one of these packages in its development effort. Although the RFP permits vendors to propose other data base management systems, it states that, "A vendor which submits an offer for both the alternative RDBMS and labor should bear in mind that the Lands Division has the option of developing a system on DB2 or ORACLE at no cost to the Lands Division." RFP at C-58b. Thus, the RFP clearly encourages use of DB2 and ORACLE in software development. See also Question and Answer 71. And INSLAW is able to deliver <u>now</u> a version of PROMIS which runs under one of the data base management systems that the Department has specified.

I. THE RFP IS UNREASONABLY RESTRICTIVE BECAUSE IT PRECLUDES INSLAW FROM BIDDING ITS OFF-THE-SHELF PROMIS DB/2 SOFTWARE.

The DOJ RFP makes it clear that the current features of PROMIS must be available in the system developed under the RFP. The RFP states on page C-56, "...the new system must provide the same functionality as the existing systems, as well as the items enumerated above, and more." Although the Department has claimed that it is not planning to

reimplement PROMIS in a relational structure, the RFP's specifications show that this is precisely what the Department has decided to do. Cf. Question and Answer 72. We have attached a chart to this protest which matches the RFP's specifications, and the capabilities of PROMIS/DB2. See Exhibit 1. With one, minor exception, this software meets all of the specifications of the RFP. Indeed, the current, hierarchical version of PROMIS meets all of the RFP's case management, file tracking and time tracking requirements. The one required feature which PROMIS currently lacks can be completed in less than 30 days.

There is simply no reason for the Department of Justice to spend money developing software which already exists. This is not a RFP which requires a vendor to add extensive capabilities to a specified case management system. Virtually all of the capabilities which the Department requires are presently available in PROMIS/DB2. Instead of waiting a year or more to complete a development effort, the Department should either conduct a competitive procurement for PROMIS/DB2 or equivalent software, or at the least allow INSLAW to propose its off-the-shelf PROMIS/DB2 package as an alternative to a development project.

As presently structured, the RFP completely prohibits INSLAW from proposing PROMIS/DB2 in DOJ's procurement. The RFP's questions and answers state categorically that the Department will not "give serious consideration to using an existing case management software that could be easily modified to meet stated requirements...." Question and Answer 61.

Off-the-shelf software is also precluded by provisions which require the vendor to give the Department title to software delivered under the contract. The "custom software, documentation, and other original products produced and provided to the Lands Division" under the RFP "shall be the sole and exclusive property of the U.S. Government....." RFP at H-8-H-9. Under Clause E-4, "Responsibility for Supplies," the RFP specifies that, "Title to supplies furnished under this contract shall pass to the Government upon formal acceptance...." The RFP also does not contain standard FAR clauses which permit vendors to supply software with restricted rights.

In addition, the RFP does not contain any provisions which would permit the Department to evaluate a solution based on off-the-shelf software. The cost evaluation is based on the offeror's fixed price quotes for development work. See RFP at B-1. There is no provision for proposing software licenses in lieu of this work. And even if there were, the RFP does not contain the minimum information required to prepare such a proposal, such as the number of licenses evaluated, the range of acceptable terms for the license, and the locations for licensed software.

Similarly, the RFP's technical evaluation does not encompass proposals of off-the-shelf software. A major portion of the technical evaluation will assess the offeror's technical approach to the RFP's tasks. RFP at M-12-M-2. Those tasks are defined as steps in software development, such as preparation of a detailed design document, development of a pilot

system and system development and implementation. Id. at C-60-62. An offeror is required to address these development steps even if he could bypass them entirely by proposing off-the-shelf software. The structure of the RFP underscores the Department's refusal in the questions and answers to consider any proposals of existing case management systems.

The Department's refusal to evaluate existing case management systems is arbitrary and irrational. This restriction violates the agency's obligations to maximize "full and open competition", 41 U.S.C. § 253a(a); FAR 10.002; to set forth requirements "in the least restrictive terms possible," FIRMR 201-11.001(b); and develop specifications "in such a manner as is necessary to maximize, and not limit, competition." FIRMR 201-30-013-1.

Moreover, DOJ's exclusion of commercial systems flies in the face of the requirement that agencies seek out and utilize commercial products when such products can sufficiently meet agency needs. FAR 11.002. The General Services Board of Contract Appeals ("GSBCA") has confirmed that:

> There is clearly a preference for such products and a requirement that the Government make reasonable efforts to provide for the acquisition of commercial products when they adequately satisfy the Government's needs.

Julie Research Laboratories, Inc., GSBCA 8919-P, June 9, 1987, 87-2 BCA ¶ 19,919 at 100,790.

The law is unequivocal regarding all competition restrictions in government procurements. An agency may not employ restrictive

requirements unless such restrictions "reflect the agency's actual minimum needs," and are "entirely necessary." International Systems Marketing, Inc., GSBCA 7948-P, 85-3 BCA ¶ 189,196, at 91,355; 41 U.S.C. § 253a(a)(2); FAR 10.002, 10.004. Where agencies have not been able to provide a clear showing that restrictive elements in their solicitations were required to meet agency needs, the GSBCA and the GAO have not hesitated to find such restrictions illegal. See Insyst Corp., GSBCA 10032-P, June 29, 1989, 89-3 BCA ¶ 22,050 ("all or none" requirement in RFP for computer software, hardware and maintenance was not adequately justified by agency and thus unduly restrictive.); PacifiCorp Capital, Inc., GSBCA 9733-P, December 7, 1988, 89-1 BCA ¶ 21,378 (single award for six computer configurations and penalty for non-manufacturer maintenance found unnecessary for agency's minimum needs and therefore unlawful); Motorola Computer Systems, Inc., GSBCA 8596-P, September 17, 1986, 86-3 BCA ¶ 19,309 (requirement for key disk system to display field number on status line as opposed to elsewhere on the screen found irrelevant to government's needs and overly restrictive); Data-Team, Inc., B-233676, April 5, 1989, 89-1 CPD ¶ 355 (agency failed to show restriction of copier machine procurement to dry-toner only machines was necessary for agency's needs).

DOJ's exclusion of currently available, commercially-owned case management software bears no relation to its minimum needs. DOJ's functional needs, as expressed in the RFP, can all be met by INSLAW's software (including use of a specified relational data base management

system) without the delay and expense of development. PROMIS not only can perform the requirements stated in the solicitation, but offers specific features and functionality that DOJ apparently considered in developing its stated requirements.

Notwithstanding the suitability of PROMIS for performing the agency's needs, the RFP, as now written, excludes INSLAW from offering its PROMIS product as a solution. This procurement's unjustified exclusion of commercially-owned systems is not unlike procurements where leasing proposals have been found to be unjustifiably excluded from competition. In Peninsula Telephone and Telegraph Co., B-192171, March 14, 1979, 79-1 CPD ¶ 176, GAO rejected an RFP that solicited only offers to sell, as opposed to offers to lease, a Naval communications system. In that case, GAO found that because the Navy could provide no reason related to its operational needs for buying a system as opposed to leasing a system, its purchase-only limitation was unduly restrictive. Id. at 2.

In this case, DOJ's minimum needs are not development and ownership of case management software. Rather, DOJ simply needs case management software to perform the functions indicated in the solicitation - - functions INSLAW's product can fully perform.

II. TO THE EXTENT THE RFP'S REQUIREMENT REGARDING 30-DAY OPERATIONAL ALTERNATIVE SOFTWARE CAN BE APPLIED TO COMMERCIAL CASE MANAGEMENT PRODUCTS, IT IS UNREASONABLY RESTRICTIVE.

As discussed above, this RFP clearly contemplates the design and development of case management software and excludes proposals to provide commercially-owned systems. The solicitation contains a provision, however, which is ambiguous at best and unduly restrictive under at least one interpretation.

With Amendment No. P004, the solicitation was modified to allow offerors to propose "an alternative relational database management product". This modification includes, in relevant part, the following statements:

> ...the government will consider an alternative relational database management product, provided that such a system will operate under MVS/XA, can be developed under CICS, and meets the other requirements set forth in this solicitation. Companies may propose an alternative software product contingent upon the use of DB2 or Oracle as an operational tool, or the alternative software may operate independently of DB2 and Oracle. <u>However, the alternative package must have been operational at a customer site(s) at least 30 days before the close of this solicitation</u>.

RFP, at C-58a, Amendment No. P004, (emphasis added).

The 30-day operational requirement in Amendment P004 appears to apply to any alternative relational database management product offered. However, to the extent that the 30-day requirement is interpreted as applying to a commercially-owned case management system that operates

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under one of the specified database management products (i.e. DB2 or Oracle), it is an unreasonable and unnecessary restriction.

It is impossible to reconcile DOJ's willingness to develop case management software over a one year period with a requirement that any commercially-owned software operate under DB2 or Oracle operate at a customer site prior to submission of proposals. This requirement, if applicable, bears no relation to any agency needs and is therefore unduly restrictive. See Memorex Corp., GSBCA 7927-P, July 9, 1985, 85-3 BCA ¶ 18,289 (reliability standard in a solicitation for disk drives was not a legitimate attempt to meet the agency's minimum needs); Daniel H. Wagner, Associates, Inc., B-220633, February 18, 1986, 86-1 CPD ¶ 166 (requirements unduly restrictive when the types and durations of experience required of the contractor's personnel were found to be unnecessary in order to satisfy the government's needs.)

III. THE RFP IS WIRED FOR SOFTWARE DEVELOPMENT AND SERVICES CORPORATION.

Although the RFP specifically precludes INSLAW from proposing PROMIS, it requires offerors to demonstrate extensive amounts of PROMIS experience in order to win DOJ's procurement. These requirements have already raised concerns in the vendor community. Question and Answer 73 reflect the scope of the RFP's restrictions:

> Q73. Regarding the required Corporate Qualifications, p.C-67, why does the Contractor need to have "at least five years' experience and possess a working knowledge of PROMIS,

SAS and Easytrieve software packages, VM/CMS and MVS/XA operating systems, IBM products (such as CICS), the Wang VS system structure, and the Data General MV AOS-VS operating environment." The Contractor may need some experience in these areas, but five years seems excessive and overly restrictive. Also, why does the contractor need experience in PROMIS? PROMIS is written in COBOL. (p.C-13) Why would experience in COBOL not suffice? It would be more appropriate to require five years experience in the DBMS that will be used for implementing the new system.

A73. Corporate qualifications were identified after a careful review of the current hardware, software, and operating environments for each of our systems. It was necessary in this instance to require a substantial amount of experience due to the disparate nature of the current systems and the knowledge required to work on them. Please note, however, that, most of the personnel qualifications do not mandate this type of experience. (Emphasis added).

The last sentence of the Department's non-answer contains a serious error. In fact, PROMIS experience is required for virtually all of the positions specified in the RFP. Thus, the RFP requires the contractor to have "at least five years' experience and possess a working knowledge of PROMIS." RFP at C-67.[1] The personnel qualifications for the Project

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[1]It is true that the RFP also states, in this section as in all of the personnel qualification sections quoted below that, "(Demonstrated equal experience is acceptable provided that such a system is a hierarchical database and that companies provide system and user documentation for Lands Division review. In addition, the company must describe in writing how such a system is comparable to PROMIS in both structure and functionality.)" See RFP at C-67-67a; See also id. at C-69, C-71, C-73, C-75. Thus, in order to justify evaluation of his alternative experience, the vendor must discuss PROMIS' structure and functionality. This basically requires PROMIS experience for the purpose of demonstrating that the vendor need not have PROMIS experience. It is also problematical as to whether a vendor could provide alternative system and user documentation for review since the circulation of such documentation is normally restricted by license. Moreover, the Department has not provided any guidance as to what software will be considered comparable to PROMIS. A vendor which does not have PROMIS experience is taking a considerable risk that the Department will consider his

Manager/Technical Analyst define as "highly desirable" "two years' experience each with PROMIS software...." RFP at C-69. The mandatory experience of the Senior Technical Systems Engineer includes, "Three years experience each with PROMIS software...." Id. at C-71. "Highly Desirable" experience for the Senior Systems Analyst includes, "Three years' experience with PROMIS...." Id. at C-73. The same level of PROMIS experience is also "highly desirable" for the Senior Programmer. In fact, the only personnel levels for which PROMIS experience is not "mandatory" or "highly desirable" are the Technical Writer and the Word Processing Specialist. As a result, it is almost inconceivable that a vendor could obtain a high technical score without extensive PROMIS experience. Such experience is heavily evaluated under the Personnel Qualifications and Corporate Experience, which notes that "Special emphasis should be given to the offeror's current (within past 3 years) experience in PROMIS, SAS, and Easytrieve....." RFP at M-2. PROMIS experience plays a significant role in technical evaluation criteria which account for 80 out of the 100 possible technical points.

But PROMIS experience would be required to compete in this procurement even if the RFP never mentioned the word "PROMIS." PROMIS experience is essential simply to bid the job. As stated above, the

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alternative experience comparable --assuming, of course, that a vendor without PROMIS experience is able to "describe in writing" how alternative software matches PROMIS' "structure and functionality." The Department has not provided any salient characteristics, which would be required, for example, in a brand name or equal procurement, for an objective evaluation of comparability. For all practical purposes, this RFP is limited to vendors with the specified PROMIS experience.

RFP requires offerors to develop a case management system containing all the current functionality of PROMIS on a fixed price basis. Moreover, the development schedule requires an offeror to complete the development work within a year. The RFP does not contain sufficient design specifications which would permit a vendor to accurately gauge the complexity of this effort. Indeed, one vendor has already asked:

> ...Why was the System Design not identified as Phase 1 and the vendor given an opportunity to submit a fixed price proposal for this? It would be very difficult to estimate the hours and cost to develop a case management system without the System Design document, and it would seem that the Government's decision to have the same contractor do both the design and the implementation does not have the kinds of controls that Government contracts usually have. (Emphasis added).
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> RFP, Question 67. (Emphasis added). See also Question and Answer 39.

The Department of Justice flatly rejected this suggestion. And this rejection leaves vendors with a major risk--unless they have a detailed knowledge of the PROMIS software which now runs at Justice. That version of PROMIS was developed over a period of not one but nine years. PROMIS includes hundreds of thousands of lines of code. The cost to INSLAW of development exceeds $10,000,000. An offeror who proposed, on a fixed price basis, to provide "the same functionality as the existing systems....and more" without a detailed knowledge as to how those systems are programmed would be courting disaster.

Thus, PROMIS experience is a clear prerequisite to bidding this RFP. But the RFP restricted the range of acceptable experience further by labelling as "highly desirable" experience with or knowledge of "Justice Data Center operations." See RFP at C-70, C-72, C-73a, and C-75a. This "highly desirable" criterion applies to the Project Manager/Technical Analyst, the Senior Systems Technical Engineer, the Senior Systems Analyst, and the Senior Programmer. In other words, only the Technical Writer and the Word Processing Specialist will be evaluated without regard to their experience with the Justice Data Center.

These experience requirements, and the practical constraints imposed by the requirement to bid the job on a fixed price basis, essentially limit the number of firms which can compete for the procurement to one. INSLAW is unable to compete because the Department refuses to evaluate off-the-shelf software, and requires title to any software product proposed. As the sole, legitimate source of the PROMIS software now installed at the Lands Division, INSLAW is uniquely familiar with the capabilities of third parties to develop PROMIS-like applications. In INSLAW's opinion, the RFP's experience requirements--both explicit and implicit--can only be satisfied by Software Development and Services Corporation (SDSC).

SDSC is headed by William T. Garbee, Jr. who served as INSLAW's Vice President for Software. He resigned from INSLAW in the first quarter of 1985. INSLAW believes that Mr. Garbee has recruited at least four former INSLAW employees to work with him at SDSC.

Mr. Garbee has been performing at least two PROMIS-related contracts for the Land and Natural Resources Division. In 1987, SDSC received a subcontract from Acumenics to develop a prototype for a new case management system. Earlier, in November 1986, the Land and Natural Resources Division awarded a contract to SDSC for the support and enhancement of PROMIS. The contracting officer who awarded the contract to SDSC in competition with INSLAW was Peter Videnieks. In September, 1987, the US Bankruptcy Court permanently enjoined Videnieks from any further official involvement with INSLAW because of bias against INSLAW and malice.

Thus, Mr. Garbee in particular, and SDSC in general, possess extensive PROMIS experience, as well as experience with the Justice Data Center which is required for a successful proposal. INSLAW is not aware of any other source, except itself, which possesses the requisite experience. The DOJ RFP is clearly a sole source procurement masquerading as a competitive acquisition.

The scope of DOJ's restrictions exceed any reasonable requirement. There is no need to structure the procurement so that any development contractor must assume inordinate risk in order to compete for this procurement. [2] If the Department of Justice developed an adequate

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[2]Indeed, the effort required to develop a functionally identical system to PROMIS is so great that INSLAW has serious doubts as to whether the work can be accomplished in one year--even by a firm so intimately acquainted with PROMIS as SDSC. INSLAW seriously questions that any firm could develop an equivalent system during a year without access to PROMIS source code. Both DOJ employees and SDSC are likely to have access to this code during the period of development specified in the DOJ RFP.

specification, it would not have to rely so heavily on precisely-defined experience to insure contract performance. Similarly, the ability to propose off-the-shelf software would enhance competition for this requirement. There is no valid reason for excluding such software from consideration. Indeed, the restrictions in this RFP appear to be based not on any legitimate need of the Government, but on the Department of Justice's bias against INSLAW which has been judicially recognized on at least two occasions.

The Department of Justice simply cannot justify the extent to which it has restricted competition for this procurement. Such justifications are particularly difficult where, as here, the procurement is effectively restricted to a single source. When solicitations contain requirements that only one offeror can satisfy, or that favor one offeror, and such requirements are not clearly necessary to satisfy the agency's minimum needs, the procurement will be ruled an illegal de facto sole source. University Research Corp., B-216461, Feb. 19, 1985, 85-1 CPD ¶ 210. In University Research, the protester contended that AID's solicitation for performance of certain hospitality services was structured so that only the incumbent contractor could receive the award. GAO sustained the protest, finding that

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INSLAW makes PROMIS source code available to all of its customers so that they can prepare custom adaptations. Although customer use of such source code is restricted by license, it is difficult for INSLAW to police all customers' compliance with the license terms. The US Bankruptcy Court has already ruled that the Department of Justice "converted INSLAW's privately-financed proprietary enhancements by trickery, fraud, and deceit...." In Re. Inslaw, Order dated January 25, 1988 at 2. This prior conduct, combined with the RFP's requirement to complete an enormous volume of code in an extremely short period raise the disturbing possibility that the DOJ 's purpose is not to develop PROMIS-like software, but to steal it.

the AID solicitation, while presented as a competitive procurement, was drafted to result in a "de facto sole-source award". Id. at 7.

Similarly, in Memorex Corp., B-213430, July 9, 1984, 84-2 CPD ¶ 22, GAO found that a procurement for data access storage devices contained requirements which were unduly restrictive because, taken together, only one firm could supply equipment to meet the requirements. The protester argued that requirements for new equipment and single density drives were not related to the government's needs, but instead inserted to restrict the competition to one vendor. GAO granted the protest, finding that the agency could not adequately justify the restrictive specifications.

Finally, in DSI, Incorporated, GSBCA 8568-P, September 22, 1986, 87-1 BCA ¶ 19,407, the GSBCA ordered cancellation of an RFP for a single vendor to supply brand-name computer hardware, applications software and maintenance services because it unlawfully restricted competition to the hardware manufacturer's entities and excluded third-party vendors. In DSI, the protester did not contest the make and model restriction, but claimed the single-vendor restriction unnecessarily precluded all third party vendors from competing. The Board agreed stating:

> We reject respondent's argument that it has obtained adequate competition. The question properly is whether it has obtained all the competition that is available, and the answer is that it has not. The CICA imposes a clear requirement that agencies undertake an affirmative effort to maximize competition.

Id. at 98,141.

In this case as well, the Department does not have any valid justification for the restrictions contained in its RFP. Accordingly, the Department must cancel its solicitation because it is unreasonably restrictive.

IV. THE RFP IS ALSO DEFECTIVE BECAUSE IT IS BASED ON FLAWED AND INADEQUATE MARKET RESEARCH.

DOJ's apparent disregard for the commercial product preferences expressed at FAR Part 11 may stem in part from its flawed assessment of available commercial case management systems. DOJ's "Requirements Study" for this procurement concluded that "none of the available commercial legal packages would meet the Land CMS requirements without substantial modification." This conclusion was reportedly made after review of several different case management software systems used commercially and by DOJ. However, the study makes no mention of INSLAW's PROMIS system which is not only widely used in the commercial marketplace, but installed in more than 40 U.S. Attorneys' Offices and the DOJ Lands Division. The authors of the study did not interview INSLAW, and apparently made no effort to determine the extent of PROMIS' relational capabilities.

Agencies are required by law to conduct acquisition planning, including "market research" in preparation for their procurements. 41 U.S.C. §253a(a)(1)(B); FAR 7.102, 10.002; FIRMR 201-11.003. The government's market research is to focus on determining the availability of

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"commercial products" to satisfy the agency's minimum needs. FAR 11.004(a); FAR 10.001. Applicable regulations state in relevant part:

> Once the Government's needs have been functionally described, market research and analysis shall be conducted to ascertain the availability of commercial products to meet those needs...Market research and analysis involves obtaining the following information, as appropriate...The availability of products suitable, as is or with minor modification for meeting the need...

FAR 11.004.

The function of market research is to maximize competition for agency requirements. In TMS Building Maintenance, B-220588, Jan. 22, 1986, 86-1 CPD ¶ 68, GAO described the purpose of a market survey as follows:

> [It] is not to determine the cost benefits of contracting for services but, in accordance with the principle that agencies should achieve maximum competition, to determine if there are other qualified sources capable of meeting the government's needs.

Id. at 5.

Where agencies have failed to conduct adequate market research, resulting competitive restrictions will not be allowed. Jervis B. Webb Co., B-211724, 85-1 CPD ¶ 35 (1985) (lack of a market survey led, in part, to a finding that the agency's sole source justification was inadequate); International Systems Marketing, Inc., GSBCA 7948-P, June 19, 1985, 85-3 BCA ¶ 18,196 (brand name restrictions on modems found to be improper because agency failed to adequately assess other commercial options for fulfilling the agency's minimum needs). In sustaining the protest in International Systems Marketing, Inc., the GSBCA stated:

> [W]e conclude that respondent took little or no action to identify and to evaluate less restrictive methods of expressing its requirements for the command-driven external modems. Proper acquisition planning requires that these actions be accomplished before, and not after, a solicitation has been issued...No such analysis occurred here....

Id. at 91,355.

DOJ's acquisition planning is similarly flawed because it apparently made no effort to evaluate whether INSLAW's case management software could meet its needs. DOJ's curious omission of PROMIS from its market analysis calls into question whether its analysis was performed in good faith or was designed for competitive restrictions.

V. THE RFP IS DEFECTIVE DUE TO INCLUSION OF ERRONEOUS AND MISLEADING INFOMATION REGARDING DOJ'S OWNERSHIP OF ITS CURRENT CASE MANAGEMENT SOFTWARE

The RFP contains inaccurate and misleading information with regard to DOJ's ownership of the case management software it currently operates. In response to Vendor Question 46, DOJ stated that it owned the source code for all its systems and would make such information available to offerors. The primary system which DOJ uses is INSLAW's PROMIS software. However, INSLAW is the sole owner of all rights to the PROMIS versions now operating at DOJ. When INSLAW notified DOJ of the erroneous statement it had incorporated into the RFP, DOJ cavalierly claimed its statement applied only to the 1979 version of PROMIS software. However, this is not the current version of the PROMIS which DOJ now runs. And Question 46 specifically asked whether DOJ owns "source code

for all of the current systems?" DOJ responded in the affirmative. Since DOJ does not own source code for the current version of PROMIS, the Department has misled the vendors who are reviewing the RFP, and may have created the basis for a major claim against the Government.

Solicitations are required to be free from ambiguity and inaccuracies. Worldwide Marine, Inc., B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152. Solicitations containing inaccurate or ambiguous information impede full and open competition by failing to assure that offerors are competing on a "common" or "equal" basis. North American Reporting, Inc., 80-2 CPD ¶ 364 (1980) (ambiguous phrase in solicitation found defective because it allowed different interpretations among bidders with regard to delivery requirements); Kemp Industries, Inc., B-192301, 78-2 CPD ¶ 248 (1978) (Solicitation defective because of ambiguity and inaccuracy regarding type of motor assemble to be used in power pack supplying howitzers.)

In this case, DOJ's claim to ownership of "the source code for all of the automated systems it uses" is patently in error. By including this erroneous representation in the solicitation, DOJ is leading offerors to believe that they will have access to the source code for all DOJ systems, including PROMIS. This representation not only reinforces INSLAW's concerns about the protection of its proprietary rights in the PROMIS software, but could result in offerors submitting proposals under an erroneous assumption that PROMIS source code will be available to them during their design and development effort.

VI. THE RFP VIOLATES THE BANKRUPTCY COURT'S INJUNCTION AGAINST THE CONVERSION OF PROMIS SOFTWARE.

The RFP is also defective because it violates the terms of the injunction issued by Judge Bason on January 25, 1988 which enjoined the Department from certain improper uses of INSLAW's proprietary PROMIS software. The Department of Justice has correctly construed Judge Bason's order as preventing conversion of PROMIS systems that the Department currently uses. DOJ took this position in an August 25, 1989 Agency Procurement Request (APR) to GSA for sole source authority to buy 43 minicomputer systems at a cost of $4,000,000. In that APR, the Department represented to GSA that

> ...the DOJ is currently enjoined from any further dissemination of the PROMIS and USACTS-II case management system by order of the U.S. Bankruptcy Court for the District of Columbia in the case of Inslaw v. United States, Adversary Proceeding No. 86-0069. The court has upheld Inslaw's claim that the PROMIS and USACTS-II software is proprietary and that its use by DOJ may not be expanded beyond its current implementation. Since the DOJ is currently enjoined by the court from undertaking a conversion of the PROMIS and USACTS-II case management system, the present Prime equipment must be replaced by Prime equipment on an interim basis. (Emphasis added)

As previously shown, the case management software described in the DOJ RFP precisely matches the capabilities and functionality of the current PROMIS system. The RFP requires a vendor to take those capabilities and functionality and convert them to run in connection with a relational data base management system. This procurement is simply a conversion task

masquerading as a development effort. Indeed, the Department has even signaled a willingness to make source code available to assist vendors in performing this task. The Department's efforts to obtain case management software based on PROMIS exemplifies the type of conversion which it cannot perform according to DOJ's prior representations to GSA. For this reason alone, the DOJ RFP should be cancelled.

CONCLUSION

Based on the considerations set forth in this letter, INSLAW requests the Department of Justice to cancel the RFP, and issue a new solicitation which neither restricts competition, nor violates court orders. INSLAW reserves the right to bring this matter to the attention of the GSA Board of Contract Appeals if it is unable to obtain satisfactory relief from your office.

Sincerely,

David S. Cohen
Counsel for INSLAW, Inc.

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ELLIOT L. RICHARDSON
PARTNER

COPY

May 11, 1989

CL|IW|CO-02

The Honorable Dick Thornburgh
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

As you undoubtedly know through Robin Ross, I have for some time been seeking the opportunity to talk to you about an aspect of the INSLAW matter that seems to me to belong squarely in your lap. This is the conflict of interest involving the Department of Justice itself that I first called to your attention in my letter of August 19, 1988. The conflict arises from the fact that the Department is defending itself against a civil suit brought by INSLAW while at the same time dealing with allegations of criminal conduct on the part of its own employees that would, if proven, destroy that very defense.

The manner in which the Department has up to now responded to the situation makes it apparent that defense of the civil suit has been given priority over the criminal investigation. Indeed, you yourself virtually acknowledged this the other day in your response to a question put to you by Judiciary Committee Chairman Jack Brooks. It is clear, in any case, that the Department is conducting an all-out, no-holds-barred defense of the civil suit while dragging its feet on the criminal investigation.

We are aware, of course, that some kind of an investigation has been conducted. Indeed, we have been told that it is now nearly finished. We also know, however, that the investigation cannot have been thorough or complete. This conclusion is compelled by the following facts:

(a) A thorough investigation would have had to seek information from William A. Hamilton, President of INSLAW. He not only knows far more about the INSLAW matter than anyone else, but the accuracy and retentiveness of his memory have been confirmed time and again by the discovery of documents and the corroborative testimony of others.*

(b) No one has talked to Mr. Work or me; after the Hamiltons, we are the next-best informed about the case. Despite our inevitable bias, both of us are experienced prosecutors and are quite capable of evaluating evidence and identifying leads that a conscientious investigation would have pursued.

(c) Had the Department conducted a thorough investigation, it would have interrogated many of the same individuals who have given us leads and information. To the best of our knowledge, only one of those individuals has heard from anyone representing the Department.

For reasons previously explained by Mr. Work to the Public Integrity Section and restated in several letters to Mr. Keeney, the findings of the Bankruptcy Court should in themselves have been sufficient to trigger a thorough investigation. Since then significant new information, some of it referred to in my memorandum to Mr. Ross, has confirmed and supplemented those findings. Among the most important and solidly-grounded leads that had by then been uncovered are the following:

(a) Early in 1981 Meese, Earl Brian, and Edwin Thomas, all close friends, converged on Washington. In subsequent months Meese allowed Brian to use a White House office; Thomas became an aide to Meese and borrowed $100,000 from Brian to buy a house; Mrs. Meese, with $15,000 loaned by Thomas, bought stock (later sold at a loss) in Biotech Capital Corporation, a Brian company, and stock (later sold at a profit) in American Cytogenetics, another Brian company.

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*In a phone conversation with Mr. Ross on October 11, 1988 I informed him that Charles R. Work, INSLAW's trial counsel, and I had advised Mr. Hamilton not to agree to an interview by OPR attorney Robert Lyons and assured Mr. Ross that INSLAW would be glad to cooperate with an unbiased investigation. A follow-up memorandum explaining the reasons for this advice reiterated INSLAW's readiness to cooperate.

(b) In the summer of 1981 INSLAW was seeking a contract to install PROMIS in the U.S. Attorneys' Offices. When it appeared probable that INSLAW would get the contract, the PROMIS project manager and contracting officer were removed and replaced by recruits from outside the Department, both of whom were found by the Bankruptcy Court to be biased against INSLAW.

(c) In June or July of 1983, a whistleblower warned Senator Baucus that Meese and Jensen were planning to award a "massive sweetheart contract" to their friends to install PROMIS in the Department as soon as Meese became Attorney General.

(d) In April, 1983, Hadron, Inc., a Biotech subsidiary, offered to purchase INSLAW. Hamilton told Dominick Laiti, Hadron's chairman, that he was not interested. Laiti said, "We have ways of making you sell." Hadron later received a $40 million contract from the Department.*

(e) On February 8, 1985, the day after INSLAW filed in bankruptcy, AT&T's counsel, a lawyer named Ken Rosen never previously employed by AT&T, launched an effort to push INSLAW into liquidation. Rosen's co-counsel was Shea & Gould, who were also Brian's counsel. There is evidence that Rosen was acting in collusion with the Executive Office for U.S. Trustees.

(f) The two versions of Cornelius Blackshear's testimony with regard to that Office's role cannot both be true. It has since been reported that Blackshear has recanted his recantation. The original Blackshear testimony is corroborated by Anthony Pasciuto, whom OPR attempted to get rid of, and several other witnesses. Blackshear explained his first recantation on the ground that he had confused INSLAW with UPI, another bankrupt company. Brian made a bid for UPI while it was in bankruptcy and later took it over.

(g) On May 23, 1986, the Department published a request for proposals (RFP) on a large office automation and case management system. Called "Project Eagle," this RFP is estimated to cost some $212 million, not counting expansion options. Project Eagle case management software is an essential component of any such system; it is a

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*Independent Counsel Jacob Stein had all the information in subparagraph (a) but not the information in this subparagraph.

function performed uniquely well by PROMIS. When first released, the RFP stated that the Department planned to develop new case management software once the Project Eagle computer hardware contract was awarded. The Department later amended the RFP in a manner indicative of a plan to install PROMIS. Although the Department at one point denied this implication, it ultimately admitted, in a pleading filed in the INSLAW litigation, that the added requirements were issued for the express purpose of making possible the use of PROMIS.

(h) Notwithstanding the seriousness of the allegations about D. Lowell Jensen made to Ronald A. LeGrand by a trusted source in the Department, LeGrand has declined to identify his informant because the latter is still afraid to come forward. The informant has not yet been given explicit assurance of protection against reprisal.

In the six months since my memorandum to Mr. Ross a substantial amount of additional information has come to light. Some is corroborative; some is merely suggestive. All of it calls for follow-up of a kind that INSLAW has not been able to pursue because, on motion of the government, it has been denied subpoena power and access to discovery proceedings pending the government's appeal from the Bankruptcy Court judgment. Here are some examples of this additional information:

(a) Jacob Stein was unable to find any of Meese's telephone logs for the entire period from April 22 to October 12, 1983 except for 10 days. That was the period of the Department's most strenuous efforts to gain control over the PROMIS software.

(b) Two former employees of Dickstein, Shapiro & Morin, Meese's counsel in the Stein investigation, have said that they shredded about 40 boxes of Meese-related documents.

(c) Brian and Laiti contacted two New York firms in September, 1983 to raise money for the purchase of criminal justice software; according to one source, PROMIS was the software being sought.

(d) In December, 1984, Daniel Tessler of 53rd Street Ventures, which had invested in INSLAW and was one of the companies contacted by Brian in September, 1983, demanded that the Hamiltons sign over to him the voting rights of their controlling interest in INSLAW common stock.

Tessler is a cousin of Alan Tessler, the Shea & Gould partner who handled M&A work for Brian.

(e) A source in the Department has said that a Jensen aide told her in 1984 that "Jensen was the main person behind the INSLAW problem" and that "his style was to operate using his subordinates."

(f) In October, 1985, Systems and Computer Technology, Inc. began an aggressive effort to take over INSLAW. According to a former SCT official, certain Departmental employees told SCT that the Department would welcome a hostile acquisition of INSLAW and quickly settle its contract disputes with INSLAW once Hamilton was removed.

The Bankruptcy Court's most important finding was that the effort to destroy INSLAW and take over its software was manipulated by the Department's contract manager, a discharged INSLAW employee whose vindictiveness would have been checked but for the ill-will of Jensen, the unsuccessful developer of competing software. The more recent information points to an even uglier scheme: friends of Meese were to get the Project Eagle contract and use PROMIS as its software component, having acquired PROMIS by whatever means they had to employ up to and including "trickery, fraud, and deceit."

Although the combination of the Bankruptcy Court findings and the later information illustrated above may not be sufficient to support an indictment, there can be no question that it meets the requirements of "specificity" and "credibility" as these terms are used in 28 U.S.C. § 591.* While adequate to implicate individuals of the rank with which § 591(b) is concerned, this combination is even more compelling in the context of § 591(c), the "catch-all" provision.** In this instance the conflict is between individuals within the Department of Justice who cannot help being pulled in opposite directions by competing personal and institutional loyalties. The history of the Department's handling of the matter makes this conflict glaringly obvious. The result has been a tenacious defense against civil claims with consequent neglect of serious charges of criminal conduct. It is all too

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*The legislative history makes this amply clear. See e.g., S. Rep. No. 496, 97th Cong., 2d Sess. 12-13 (1982) reprinted in 1982 U.S. Code Cong. & Admin. News 3548-49.

**See id. at 9, 1982 U.S. Code Cong. & Admin. News at 3545.

evident that the Department would rather win the civil case than uncover facts that might force it to confess error.

To date, the cost to INSLAW has been exceeded only by that to the public interest. The U.S. Attorneys' Offices have been deprived of the improvements in PROMIS they would otherwise have obtained. The introduction of much-needed modern management systems for departmental litigation has been inexcusably delayed. Worse still, substantial evidence of serious wrongdoing has not been followed up. Speaking as a lawyer who has spent most of his life in public service, I do not understand this perversion of priorities.

Bill Hamilton, Chuck Work, and I share a strong sense of loyalty to the Department of Justice. We care about the integrity of its conduct. We may be wrong in believing that this has been compromised, but if so we're entitled to find that out through a process that is not flawed by a built-in conflict of interest. The only solution, as we have long insisted, is the appointment of independent counsel pursuant to the statute. In the light of the foregoing, I am confident that you will recognize the force of this contention.

Very truly yours,

Elliot L. Richardson

cc: William A. Hamilton
John C. Keeney
James C. McKay
Robert S. Ross
Charles R. Work

U. S. Department of Justice

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HAND DELIVERED

June 29, 1990

CLPIW/CO-03

David S. Cohen, Esq.
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Suite 504
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Re: Protest of INSLAW, Inc. under RFP No. JPLDN-90-R-0020

Dear Mr. Cohen:

This letter will serve to notify you of the cancellation of RFP No. JPLDN-90-R-0020 by Amendment No. P006 dated June 29, 1990, and of the agency's decision to dismiss as moot the protest on behalf of Inslaw, Incorporated which you filed with the Department on April 23, 1990.

Inslaw protested any award being made under RFP No. JPLDN-90-R-0020 soliciting proposals for development of a comprehensive case management system for the Land and Natural Resources Division of the Department of Justice. By way of relief, Inslaw requested that the Department cancel the RFP, prepare a new solicitation which would permit Inslaw to propose its off-the-shelf software and structure the new RFP in such a manner as not to violate a January 25, 1988 Bankruptcy Court injunction against the Department.

My interim response of May 14, 1990, informed you that while, in our view, the RFP as written did not preclude Inslaw or any other vendor from offering a product meeting the requirements of the solicitation, we were reviewing the RFP in order to address a number of Departmental concerns. I also requested that Inslaw clarify its allegations regarding the Bankruptcy Court injunction (i.e., specify those aspects of the solicitation Inslaw believes violated the injunction and indicate how Inslaw believes the RFP could be structured so as to avoid any such violations), and promised a full response to your protest upon receipt of your response and completion of our review.

As a result of our continuing consideration of a broad range of Departmental needs and concerns, the solicitation was cancelled. We have no immediate plans to re-solicit the Lands Division

requirement, but, in all likelihood, we will issue a new RFP for development of some case management system at a future date. In that regard, we believe it is still in Inslaw's interest to clarify its allegations regarding the Bankruptcy Court injunction as requested in my letter of May 14, 1990, i.e., how Inslaw believes the previous solicitation violated the injunction, and how Inslaw believes the RFP could be structured so as not to result in such a violation. While it is impossible to predict at this time what the requirements under a new solicitation will be, we will of course make every effort to ensure that any future solicitation comports with all applicable laws and regulations and promotes competition to the fullest extent practicable.

Sincerely,

Carol M. Rothgeb
Contracting Officer